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No. 81-2334

# In the Supreme Court of the United States

OCTOBER TERM, 1982

THE WHITE MOUNTAIN APACHE TRIBE, PETITIONER

*v.*

WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, AND JAMES G. WATT, SECRETARY OF THE INTERIOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly affirmed the dismissal of the suit filed by petitioner White Mountain Apache Tribe seeking to prevent the Attorney General of the United States from appearing in a water adjudication pending in state court in Arizona to present claims for water rights held by the United States in trust for the Tribe.

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### OPINIONS BELOW

The order of the district court (Pet. App. 6a) and the memorandum opinion of the court of appeals (Pet. App. 2a-3a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 16, 1982 (Pet. App. 1a), and a petition for rehearing was denied on April 8, 1982. The petition for a writ of certiorari was filed on June 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Since 1979, an action seeking an adjudication of rights to water from the Salt River in Arizona has been pending in the Superior Court for Maricopa County, Arizona (Pet.

App. 2a n.1). In that year, petitioner and other Indian tribes claiming rights to the use of Salt River water removed the state water proceeding to the United States District Court for the District of Arizona and there sought to have it dismissed on the ground that the State did not have jurisdiction over Indian water rights. The federal district court held that the state court did have jurisdiction and remanded the proceeding to state court. The district court also dismissed several actions filed by other Indian tribes seeking declaratory and injunctive relief against further state proceedings and, in the case of one tribe, an adjudication of its rights to Salt River water.

The United States Court of Appeals for the Ninth Circuit subsequently reversed the district court's dismissal of the suits filed by the other tribes and remanded them for a determination of whether the State of Arizona had overcome barriers to the assumption of jurisdiction over Indian water rights that the court of appeals found in the disclaimer provisions of the Arizona Enabling Act and the state constitution. *San Carlos Apache Tribe* v. *Arizona*, 668 F. 2d 1093 (9th Cir. 1982); see also *Navajo Nation* v. *United States*, 668 F. 2d 1100 (9th Cir. 1982). The State of Arizona has petitioned for a writ of certiorari to review the Ninth Circuit's decision in those cases. No. 81-2147. The United States has urged the Court to grant that petition, as well as the petition filed in a companion case, *Montana* v. *Northern Cheyenne Tribe*, No. 81-2188, to resolve a circuit conflict on the disclaimer clause issue and to clarify the law governing the relationship between federal and state water adjudications involving Indian rights.[1]

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[1]The background of the Arizona water adjudication generally is described in the Memorandum for the United States in Nos. 81-2147 and 81-2188 at 3-4, 24. We have furnished petitioner with a copy of that Memorandum.

2.a. After the federal district court in Arizona remanded the water adjudication to state court, petitioner brought this action in the United States District Court for the District of Columbia on May 24, 1981, to prevent any submissions by the United States in the state proceeding with respect to the water rights held by the United States in trust for petitioner (Pet. App. 62a-63a). Petitioner contended that the state water adjudication was of insufficient geographic scope to constitute a general adjudication to which the United States' sovereign immunity had been waived by the McCarran Amendment, 43 U.S.C. 666 (Pet. App. 29a-30a, 54a-55a), and that the Attorney General, assisted by the Secretary of the Interior, would inadequately represent the Tribe's interest in its water rights, in view of the potential presentation by the United States of other federal water right claims in the same proceeding (Pet. App. 32a, 40a-41a, 61a).

b. By order entered on June 23, 1981, the district court dismissed the complaint, holding that it did not have jurisdiction over the Attorney General's exercise of his litigating judgment (Pet. App. 6a). On March 15, 1982, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of the complaint (Pet. App. 1a-3a). The court noted in its unpublished memorandum that although petitioner had alleged that the Secretary of the Interior had violated his trust responsibilities to the Tribe, the specific action complained of was the Attorney General's decision to participate in the Arizona litigation. The court of appeals' affirmance was expressly limited to this narrow issue, and it "intimate[d] no views about federal jurisdiction * * * over a suit by this or any other tribe, challenging other actions by the Secretary of the Interior with respect to the exercise of his trust responsibilities" (*id.* at 3a). The court also refrained from expressing any view on the merits of the litigation pending in state and federal court in Arizona (*ibid.*).

c. Prior to the court of appeals' decision in this case, the United States, on January 4, 1982, filed in state court claims to the use of Salt River water for certain federal uses. On January 29, 1982, the United States filed a motion in state court to dismiss the water adjudication. On March 24, 1982, the state court issued an order holding the United States' motion to dismiss in abeyance pending a final decision by this Court on review of the Ninth Circuit's decisions in *San Carlos Apache Tribe* v. *Arizona, supra*, and *Navajo Nation* v. *Arizona, supra*, petition for certiorari pending, No. 81-2147. Under that March 24, 1982 order, the United States is not required to file any statement of water right claims for the benefit of the Tribe until whatever action this Court takes in No. 81-2147 is final.

## ARGUMENT

1. Especially given the current status of the adjudication of Indian water rights in Arizona, the dismissal of petitioner's action seeking to prevent the Attorney General from filing with the state court a claim of a right to Salt River water held in trust for petitioner plainly does not warrant review. If this Court grants certiorari in No. 81-2147 and holds that Arizona courts are without jurisdiction over Indian water rights or that such rights should be adjudicated in federal court if that forum is timely invoked,[2] the state court presumably will dismiss the water adjudication insofar as the rights held in trust for petitioner are concerned. The same result may well obtain if this Court denies certiorari in No. 81-2147, thereby leaving the Ninth Circuit's ruling on the disclaimer clause issue standing. In either event, this separate action to prevent the Attorney General from filing claims in state court would have been rendered moot.

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[2]See Memorandum for the United States in Nos. 81-2147 and 81-2188, at 17-24.

On the other hand, if this Court grants certiorari in No. 81-2147 and holds that Arizona courts are not barred by the disclaimer clauses or principles of sound judicial administration from assuming jurisdiction under the McCarran Amendment to adjudicate rights held in trust for Indians, the state court proceeding then would resume. The state court presumably then would rule on the government's pending motion to dismiss. If the state court were to grant that motion, the instant suit seeking to prevent the Attorney General from presenting the water right claim for the benefit of petitioner likewise would have been rendered moot.

Only if the state court were to deny the government's motion to dismiss after this Court takes final action on the petition in No. 81-2147 would the Attorney General then be in the position where he would have to take the action that petitioner has sought in this suit to prevent. It is, of course, uncertain that this eventuality will come to pass. But if it does, petitioner would have nothing to gain, and everything to lose, by an injunction barring the Attorney General from filing a claim to use of water for petitioner's benefit, because the state court made clear that if such a claim is not filed the water right for the benefit of the Tribe would be lost (see Pet. App. 31a n.1; see Ariz. Rev. Stat. Ann § 45-254(E) (Cumm. Supp. 1981)).

Petitioner apparently is concerned (Pet. 13-16) that the water right claims filed by the Attorney General on behalf of the United States for other federal purposes might have an effect on the amount of water claimed for the benefit of petitioner. But we do not appreciate what would be gained by the instant suit seeking to prevent the Attorney General from claiming *any* water for the Tribe's benefit; such a default could have the effect of forfeiting the water rights held for the Tribe's benefit if the state court has jurisdiction

to adjudicate those rights. In any event, if petitioner is dissatisfied at a later date with the amount of water claimed by the United States for its benefit or the Attorney General's presentation of that claim, petitioner would have a fully adequate remedy by intervening in the state court proceeding to protect its interests. Cf. *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972).

In sum, there are no considerations warranting review at this time of the Tribe's efforts to prevent the Attorney General from asserting a water right held by the United States in trust for the Tribe. Moreover, we have urged the Court to grant certiorari in Nos. 81-2147 and 81-2188 to resolve issues concerning the relationship of the state and federal courts in the adjudication of Indian water rights. Those issues are not presented here. The Court's resolution of the questions raised in Nos. 81-2147 and 81-2188 should not, we submit, be further complicated by interjection of tangential procedural questions concerning the power of a court to enjoin the Attorney General in the exercise of his litigating responsibilities.

2. Against the foregoing background, we offer only a few observations on the merits of the dismissal of petitioner's suit, for it would be extraordinary in any event if this Court were to hold that a court could enter an injunction or otherwise review the litigating judgment of the Attorney General to file or defend a lawsuit on behalf of the United States or, as here, to advance a particular claim in that lawsuit. If a claim is advanced by the Attorney General on behalf of the United States as a party to litigation, the court, state or federal, having jurisdiction of the matter may rule on the merits of that claim in the course of deciding the particular case before it. It would be quite a different matter, however, for a court to prevent the Attorney General from even presenting the claim for judicial resolution, as petitioner urges here.

The Attorney General's responsibilities with respect to the adjudication of water rights in Arizona are quite clear. In the McCarran Amendment, 43 U.S.C. 666, Congress gave consent "to join the United States as a defendant in any suit" in state or federal court for the adjudication or administration of rights to the use of water of a river system where it appears that the United States is the owner of such rights. Under 28 U.S.C. 516 and 519, the conduct of such litigation to which the United States is a party is explicitly reserved to the control of the Attorney General.

In enacting the McCarran Amendment, Congress obviously intended that the Attorney General would in fact assert in any suit in which the United States is properly joined all water rights owned by the United States. Under Article IV, Section 3 of the Constitution, Congress has the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The McCarran Amendment is one such "Rule" respecting the property of the United States, and the Attorney General, as the President's agent in fulfilling the Executive responsibility to "take Care that the Laws be faithfully executed" (Article II, Section 3), has a duty to carry out the congressional purpose by asserting the rights owned by the United States in a suit authorized by the McCarran Amendment. By the same token, the Attorney General is not authorized effectively to dispose of those rights by failing to assert them in a water adjudication, because under the Constitution, it is Congress, not the Executive, that is vested with responsibility to dispose of property owned by the United States.

Moreover, in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 809-813 (1976), this Court held that the consent to suit in the McCarran Amendment applies equally to water rights held by the

United States in trust for an Indian tribe. Accordingly, where the United States is joined as a party in state court proceedings authorized by the McCarran Amendment, the Attorney General must ensure that water rights owned by the United States for the benefit of an Indian tribe are asserted along with other rights to which the United States has title. To fail to assert the Indian rights would constitute a breach of the trust responsibility of the United States to the Indians with respect to such rights. Indeed this Court stressed in *Colorado River Water Conservation District, supra*, that the Federal Government, in consenting to suit in state court, "has not abdicated any responsibility fully to defend Indian rights in state court" (424 U.S. at 812).

In view of the Attorney General's explicit responsibilities, described above, there plainly is no basis for petitioner to obtain declaratory or injunctive relief to prevent the Attorney General from filing a claim in the Arizona state water adjudication for water rights held by the United States in trust for petitioner. This conclusion is not altered by the fact that the Attorney General also will assert water rights for other federal purposes as well. Congress has assigned to the Attorney General the responsibility for advancing *all* of the claims of the United States, including Indian claims, in suits authorized by the McCarran Amendment, and the courts must respect this congressional judgment.

If petitioner believes that the Attorney General's presentation of water rights held in trust for its benefit will be inadequate, because of what it characterizes as a conflict of interest resulting from the existence of other federal water rights or for any other reason, petitioner can fully protect its interests by intervening in the state proceeding through independent counsel of its choice. It then would be as free as any other litigant to challenge the factual and legal positions taken by the Attorney General on behalf of the

United States. But petitioner may not, in our view, invoke the jurisdiction of the United States District Court for the District of Columbia to supervise and direct the performance of the Attorney General and his agents in conducting the litigation in state court in Arizona.

Contrary to petitioner's apparent contention (Pet. 17-30), the Administrative Procedure Act (APA) does not authorize review of the Attorney General's litigating strategy. There is a substantial question whether the assertion of a claim by the Attorney General in court even constitutes the kind of "agency action" to which the judicial review provisions of the APA apply. See 5 U.S.C. 551(13), 702, 704 and 706. Even if it does, however, the assertion of a water right claim for the benefit of petitioner would not be subject to judicial review under the APA because petitioner has an "adequate remedy in a court" (5 U.S.C. 704) through intervention in the water adjudication itself and the presentation of its own legal position therein. Finally, the conduct of litigation assigned to the Attorney General traditionally has been regarded as being committed to his discretion (see, *e.g.*, *Swift & Co.* v. *United States*, 276 U.S. 311, 331-332 (1928); *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922); *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888)); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868), and, therefore, is not subject to judicial review under the APA for this additional reason as well (5 U.S.C. 701(a))—at least in the context of this case, where the Attorney General in fact would advance a claim for the Tribe's benefit if the state court adjudication resumes in the future. Cf. *Dunlop* v. *Bachowski*, 421 U.S. 560, 571-573 (1975).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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